do not think there is much substance in this part of the counter-claim for two reasons. In the first place the plaintiffs have given credit in their Claim for these materials, and secondly, as was pointed out by Mr. Hume, if these materials had been left on the site and used in the building the owner would have had to pay for them.

It is pleaded in paragraph 19 of the defence that the plaintiffs were "in default" in removing the materials belonging to the defendant from the building site. It is clear, however, that these materials were removed from the site during the stoppage of work because it was unsafe to leave them there owing to the danger of pilferage or deterioration and they were in my opinion quite properly removed by the plaintiffs to be placed in safe custody.

There will, therefore, be judgment for the plaintiffs with costs and the counter-claim will be dismissed with costs.

Claim allowed.

Solicitors: *Hogan, Adams & Allan; Pillai & Eng Cheang.*

WONG KOK KEONG v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) December 17, 1954]

[Penang — Criminal Appeal No. 51 of 1954]

Criminal Procedure Code (Cap. 21), ss. 427(1) & 448 — Certificate of Chemist not served 10 clear days before commencement of trial — Improper admission — Failure of justice — Evidence Ordinance, 1950, s. 167 read together with s. 448 of the Criminal Procedure Code — Adjournment of case could not cure defect.

In this case the appellant was seen wearing an old wrist watch with what was described as "a new gold strap" and when asked by a Senior Revenue Officer if he had further dutiable goods he produced what was described as a medal or gold sovereign which he had in his pocket. Neither of these articles had been declared when he went through the Customs Barrier. By the Customs Duties Order, 1954, gold had been made dutiable on September 22, 1954, just over a fortnight earlier. The wrist strap and the medal were sent by Customs authorities to the Government Chemist, who gave his certificate to the effect that these articles were gold, a copy of which was served upon the appellant on October 18, 1954. The trial having commenced on October 28, 1954, this certificate had not been served ten clear days before the commencement of the trial. The point that arose in this appeal was whether in the circumstances this certificate was admissible in evidence.

Held: (1) the effect of s. 427(1) of the Criminal Procedure Code is to make certain documents evidence of the truth of their contents, which would otherwise not be evidence at all, and therefore, the provisions of s. 427(1) are provisions relating to evidence rather than to procedure; (2) improper admission of evidence would occasion a failure of justice if it resulted in a decision different from that which would have been given had the evidence not been admitted; (3) the improper admission of evidence will have no effect unless it has occasioned a failure of justice and in order to discover whether there has been a failure of justice one must be guided by s. 167 of the Evidence Ordinance, 1950; (4) the test as to whether or not a judgment of the Court below should be reversed or altered on account of wrongful admission of a certificate is whether or not without that evidence there was sufficient evidence to justify the conviction; (5) if a certificate which ought not to have been admitted is admitted and there is no other evidence to prove the facts stated in the certificate then, if the accused is convicted, there has been a miscarriage of justice; (6) there was no evidence before the Court to prove that the articles in question were in fact made of gold so as to bring them within the Customs Duties Order, 1954, which makes gold a dutiable article.

Obiter dictum: once the trial had commenced no adjournment could alter the fact that the certificate had not been served ten clear days before commencement. An adjournment could only have been of value if it had been granted to enable the evidence of the Chemist himself to be given instead of using his certificate.

[Editorial Note: Evidence Ordinance, 1950, s. 167 is similar to s. 168 Evidence Ordinance (Cap. 13) of Singapore.]

Cases referred to:—

(1) *Jennings v. Kelly* (1940) A.C. 206.
(2) *Semtex v. Gladstone* (1952) 2 All E.R. 206 at p. 212.
(3) *Public Prosecutor v. Tay Tuan* (1953) M.L.J. 20.
(4) *Chong Yik v. Public Prosecutor* (1953) M.L.J. 72.
(5) *Goh Tong v. Public Prosecutor* (1953) M.L.J. 167.
(6) *Chong Peng v. Public Prosecutor* (1954) M.L.J. 39.
(7) *Ng Yee v. Public Prosecutor* (1953) M.L.J. 254.
(8) *Goh Tong v. Public Prosecutor* (1953) M.L.J. 251.
(9) *Rex v. Cohen & Bateman* 2 Cr. App. R. 197.
(10) *Rex v. Haddy* (1944) 1 K.B. 442.
(11) *Stirland v. Director of Public Prosecutions* (1944) A.C. 315.

MAGISTRATE'S CRIMINAL APPEAL.

I. K. Meek for the appellant.

D. C. Jackson (Senior Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson J.: — The appellant having crossed the ferry to Butterworth in a car driven by P.W.4 left the car at Mitchell Pier, went through the Customs Barrier on foot and rejoined the car outside a coffee shop at the corner of Pantai Road. He was observed getting into the car by a Revenue Officer, P.W.5 as a result of which a Senior Revenue

Officer chased the car and stopped it at Bagan Luar Road, where it was being re-filled with petrol. The appellant was seen to be wearing an old wrist watch with what was described as "a new gold strap" of somewhat unusual design. The appellant was then asked if he had further dutiable goods and he then produced what was described as a medal or gold sovereign which he had in his pocket.

Neither of these articles had been declared and by Legal Notification No. 527 of 1954 gold had been made dutiable on the 22nd September, 1954 just over a fortnight earlier.

The wrist strap and the medal were sent by the Customs authorities to the Government Chemist, who gave his certificate to the effect that these articles were of gold, a copy of which certificate was served upon the appellant on the 18th October, 1954. The trial having commenced on the 28th October, 1954 this certificate had not been served ten clear days before the commencement of the trial, and the first and most important point that arose in this appeal was whether in the circumstances this certificate was admissible in evidence.

There is unfortunately a conflict of judicial decision with regard to the effect of the admission of certificates under Section 427 of the Criminal Procedure Code in cases where a copy of the certificate has not been served within the time laid down in that Section. In these circumstances I think it best, before considering the authorities, to endeavour to construe the relevant Sections according to the established rules of interpretation. The wording of Section 427(1) of the Criminal Procedure Code (omitting only the words relating to the Registrar of Criminals which are not relevant to the question now before me) is as follows:—

"427(1). Any document purporting to be a report under the hand of any of the persons mentioned in sub-section (2) of this section upon any person, matter or thing examined or analysed by him ..... may be given in evidence in any enquiry, trial or other proceeding under this Code unless such person ..... shall be required to attend as a witness—

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial."

Sub-section (2) of this Section sets out a list of the persons whose certificates can be given and sub-section (3) provides that those persons are bound to state the truth in reports made under their hands.

I understand the rule with regard to the construction of provisos to be that laid down in *Jennings v. Kelly*[1] that "there is no rule that the first or enacting part is to be construed without reference to proviso. The proper course is to apply the broad general rule of construction, which is that a section or enactment must be constructed as a whole, each portion throwing light if need be on the rest".

The first point to be noted, I think, is that apart from Section 427 a report made by any person is not evidence. This is clearly laid down by Section 60 of the Evidence Ordinance which enacts with reference to the opinions of experts the "Oral evidence must in all cases whatever be direct:—

(d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds."

There appears to be some repugnancy between this Section and Section 427 of the Criminal Procedure Code. I think, therefore, that Section 427 must be looked upon as creating an exception to Section 60. This point is put by *Maxwell on Interpretation of Statutes*, 9th Edition, page 176 in this way:—

"Where a general intention is expressed and also a particular intention which is incompatible with the general one, the particular intention is considered an exception to the general one."

Reading Section 427(1) as a whole I think it is clear from the wording of the sub-section that the giving in evidence of these documents is subject to the proviso that a copy shall be delivered not less than ten clear days before the commencement of the trial. If this be correct then it is clear that in the case now before me the report was not admissible in evidence, because the proviso to the sub-section had not been complied with.

It was argued on behalf of the Crown that the failure to serve the report within the required time was a mere irregularity which could be cured under the provisions of Section 448 of the Criminal Procedure Code and it was suggested that the provisions of Section 427(1) are merely procedural and not evidential. I am unable to accept the proposition that the provisions of Section 427 are merely procedural. The fact that these provisions are contained in a Criminal Procedure Code does not really assist one way or the other, because it is clear that there are quite a number of provisions in the Criminal Procedure Code which are, in fact, rules of evidence. There is no doubt in my mind that the effect of Section 427(1) when properly complied with is to make certain documents evidence of the truth of their contents, which would otherwise not be evidence at all. I am, therefore, of the opinion that the provisions of Section

427(1) are provisions relating to evidence rather than to procedure.

This point is of importance when one comes to consider the provisions of Section 448 of the Criminal Procedure Code. This Section refers to various kinds of error, omission, irregularity and misdirection, but it appears to me that those provisions which relate to the improper admission or rejection of evidence can be clearly separated from the rest. When this is done the Section in so far as it relates to evidence reads as follows:—

"448. Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of—

(e) the improper admission or rejection of any evidence; unless such . . . . . admission or rejection of evidence has occasioned a failure of justice."

When does the improper admission of evidence occasion a failure of justice? *Prima facie* I think it would occasion a failure of justice if it resulted in a decision different from that which would have been given had the evidence not been admitted. This, it seems to me, is what is in substance laid down by Section 167 of the Evidence Ordinance, which (omitting the references to rejection of evidence) reads as follows:—

"167. The improper admission of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision . . . . ."

It appears to me that Section 448 of the Criminal Procedure Code and Section 167 of the Evidence Ordinance can be and should be read together in this way — that the improper admission of evidence will have no effect unless it has occasioned a failure of justice and that in order to discover whether there has been a failure of justice one must be guided by Section 167. I know of no criterion as to what "justice" or "a failure of justice" is except what is laid down by the law. One cannot in my opinion be guided by any such theoretical conception as natural justice. I agree, with respect, with the remark made by Finnemore J. in *Semtex v. Gladstone*[2]:—

"I hope the law of this country and natural justice will approximate always as closely as possible, but all claims and legal defences have to be grounded in law, and not according to somebody's idea of natural justice, not even that of the judge who may hear the case."

In my opinion, therefore the sole test as to whether or not the judgment of the Court below should be reversed or altered on account of the wrongful admission of this certificate is whether or not without that evidence there was sufficient evidence to justify the conviction.

I must now consider the cases cited to me in order to see how they affect the view at which I have arrived independently of those authorities. The first case on this point is that of *Public Prosecutor v. Tay Tuan*[3]. In that case the Sessions Court had held the certificate inadmissible because a copy had not been served within the required time. The learned Judge reversed this decision, not upon the ground that the error was curable, but because in his view the learned President had taken the wrong date as the date of the commencement of the trial. In *Chong Yik v. Public Prosecutor*[4] Storr J. held that the proviso to the Section in question was a condition precedent and as it had not been complied with the production of the document was an illegality and there being no other evidence on the record to support the conviction it was quashed. *Goh Tong v. Public Prosecutor*[5] was another decision of the same learned Judge to the same effect. In *Chong Peng v. Public Prosecutor*[6] the matter was carried a little further by Bellamy J. who held that before a certificate of a chemist could be given in evidence it was necessary to prove positively that a copy thereof had been served upon the appellant or his Solicitor within the required time and that in the absence of such proof the document was inadmissible. In this case also the conviction was quashed because there was no other evidence to support it.

In *Ng Yee v. Public Prosecutor*[7] it was held that although a report of a chemist was wrongly admitted because ten days' notice had not been given that the condition attached to sub-section (1) of the Section could be waived and that the admission of the report in evidence was an irregularity which could be cured by Section 422 (Section 448 Straits) of the Criminal Procedure Code.

Finally in *Goh Tong v. Public Prosecutor*[8] which was a re-hearing of an appeal by the Court of Appeal under Section 34(1) of the Courts Ordinance, the first paragraph of the judgment of the Court reads as follows:—

"Section 399(1) of the Criminal Procedure Code (Section 427 Straits) enacts that certain technical facts, including the contents of materials alleged to contain opium, may be proved by documentary evidence, provided that a copy of the certificate of the expert is delivered to the accused ten days before the commencement of the trial."

It is clear from all these authorities that where the requisite ten days' notice of the intention to use the certificate has not been given the certificate is inadmissible. The only point upon which the decisions differ is as to the effect of the wrongful admission of such a certificate, and in all the decided cases except one, the wrongful admission has resulted in the conviction being quashed on the ground that there was no other evidence on the crucial point.

Thinking, as I do, that the provisions of Section 427 are in substance provisions relating to evidence I feel constrained to follow the decisions of Storr, J. and Bellamy J.

In my opinion if a certificate, which ought not to have been admitted, is admitted and there is no other evidence to prove the facts stated in the certificate then, if the accused is convicted, there has been a miscarriage of justice; and in the words of Channell J. in *Rex v. Cohen & Bateman*[9] "there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted." That description of a miscarriage of justice was approved in *Rex v. Haddy*[10], which in turn was approved by the House of Lords in *Stirland v. Director of Public Prosecution*[11].

It becomes necessary, therefore, for me to decide whether there was any evidence other than the Chemist's report in the present case to prove that the goods in question came within the description in Legal Notification No. 527 of 1954 which makes gold articles dutiable.

Mr. Meek on behalf of the appellant pointed out that there are in the record only two references to this point. The first is in the evidence of P.W.2 when he says, speaking of the appellant:—

"He was wearing an old watch with a new gold strap, P. 1."

The other reference is in the evidence of P.W.1, where he says:—

"S.R.O. 1178 handed me a wrist watch and strap P. 1 and gold medal P. 2 which had been found with the accused."

The only other evidence before the Court was the articles themselves. The learned Deputy Public Prosecutor point out that there was also evidence that the appellant was a goldsmith and that from the general discussion which took place with the Customs officers the Court might infer that there was a discussion regarding gold articles. I do not think, however, that this can be looked upon as evidence that the articles were in fact made of gold, because the word "gold" in the context in which the witnesses used it might well refer to nothing but the colour of the article. One can well imagine a witness referring to a "gold" wrist strap because its colour is gold, although it is not actually made of gold. The fact that two witnesses, who are not experts, referred to the articles as gold is, in my opinion, no evidence at all.

It occurred to me that it might be possible for a Court or jury to look at articles of this kind and decide for themselves whether or not the metal was gold on the analogy of a decision of mine regarding playing cards. I do not think, however, that this is possible in the present case. I carefully examined the wrist strap in question and whilst it is undoubtedly heavy I could not, in the absence of evidence to assist me, decide simply from examining it whether it was in fact made of gold or of something like lead, gold-plated, or gilt. Again with regard to the coin, without expert evidence I should find it impossible to decide whether this was really made of gold or some other heavy alloy.

I have, therefore, come to the conclusion that there was no evidence before the Court to prove that the articles in question were, in fact, made of gold so as to bring them within the Legal Notification which makes gold a dutiable article.

There is one further point in the case which I think I ought to mention. The learned President appears to have thought that by adjourning the case till the following day, when the ten clear days would have run out, the defect could have been cured. This, however, is not correct. An adjournment before any evidence was tendered would, perhaps, have rectified the position; but once the trial had commenced no adjournment could alter the fact that the certificate had not been served ten clear days before the commencement. An adjournment could only have been of value if it had been granted to enable the evidence of the Chemist himself to be given instead of using his certificate.

Although the error in this case was a technical one, in that the notice given to the accused of intention to use the certificate was only one day short of the prescribed time, yet in view of the various decided cases in which such an error has been held fatal I think care should have been taken to ensure that the certificate was served in good time. Moreover, when the objection was taken in the Court below it was still open to the prosecution to apply for an adjournment (which probably could have been quite a short one) to enable them to call the Chemist. This, however, was not done.

In all the circumstances I feel bound to follow the course adopted in the cases of *Chong Yik v. Public Prosecutor*[4], *Goh Tong v. Public Prosecutor*[5][8] and *Chong Peng v. Public Prosecutor*[6] and I, therefore, allow the appeal and quash the conviction.

Appeal allowed.

Solicitors for the appellant: *Presgrave & Matthews.*